Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	**MM Docket No. 92-266**
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

FURTHER COMMENTS OF VIACOM INTERNATIONAL INC.

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Viacom International Inc. ("Viacom"), by its attorneys, hereby submits these comments in response to the Commission's Report and Order and Further Notice of Proposed Rule Making ("Report and Order" and "Further Notice") in the above-captioned docket.

I. INTRODUCTION AND SUMMARY

Viacom is a diversified entertainment company which owns and operates video program services, cable systems and other entertainment-related businesses.[1] As such, Viacom will be affected substantially by the implementation of the rate regulation

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[1] Showtime Networks Inc. ("SNI"), a wholly-owned subsidiary

provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act" or "Act").[2]

into account," among other factors, "the rates for cable systems, if any, that are subject to effective competition." Section 623(b)(2)(C)(i).

Unlike the approach it took in the Cable Communications Policy Act of 1984[3] ("the 1984 Act") where it gave the FCC discretion to define effective competition,[4] Congress in the 1992 Act specifically defined what it meant by the term "effective competition." Effective competition was expressly and unequivocally defined, in Section 623 of the Cable Act, to exist if "fewer than 30 percent of the households in the franchise area

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[3] Pub. L. No. 98-549, 98 Stat. 2779.

[4] Cable Communications Policy Act of 1984, Section 623(b)(2)(A). Pursuant to the 1984 Act, the FCC in 1985 held that a cable company was subject to effective competition if three unduplicated over-the-air signals were available to homes in the cable community. See Report and Order, MM Docket No. 84-1296, 50 Fed. Reg. 18637 (1985), Memorandum Opinion and Order, MM Docket No. 84-1296, 51 Fed. Reg. 21770 (1986); Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, 3 FCC Rcd 2617 (1988) (Second Report and Order) (amending signal availability standard in response to American Civil Liberties Union v. FCC ("ACLU"), 823 F.2d 1554 (D.C. Cir. 1987), cert. denied 485 U.S. 959 (1988), discussed infra). The rules were further revised in 1991 to provide that effective competition would be presumed if either: (1) six unduplicated over-the-air broadcast television signals are available in the entire cable community; or, (2) an independently owned, competing multichannel video delivery service is available to 50 percent of the homes passed by the incumbent cable system and is subscribed to by at least 10 percent of the homes passed by the alternative system within the incumbent cable system's service area. See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket No. 90-4, 6 FCC Rcd 4545 (1991) (Report and Order and Second Further Notice of Proposed Rule Making).

subscribe to the cable service of a cable system . . ."[5]

Despite this explicit congressional mandate, in its Further Notice, the Commission solicits comment on whether it should and "*may lawfully*, exclude the rates of [systems in low penetration areas] from [its] competitive rate calculations."[6] (emphasis added). In support of its proposed departure from the Act, the Commission speculates that: "It is possible . . . that exclusion from our sample of rates of systems in low penetration areas may produce a better measure of competitive rate differential. Thus, the low penetration of cable systems in some areas may be attributable to factors other than the presence of competing video distribution services."[7] The Commission states that its preliminary analysis reveals that the exclusion of low penetration systems will produce a competitive rate differential of approximately 28 percent.[8]

Section 623(b)(2) of the Cable Act directs the Commission to

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[5] In addition, a cable system is deemed subject to effective competition if: "(B)(i) the franchise area is served by at least two unaffiliated multichannel video programming distributors, each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area." Section 623(l)(1).

[6] Further Notice, ¶ 562.

[7] Id., ¶ 561.

[8] Id.

prescribe regulations with respect to cable rates and allows the Commission to exercise its discretion by adopting formulas or other mechanisms and procedures in carrying out its mandate

implementing rate regulations where the Commission is instructed to "take into account . . . the rates for cable systems . . . that are subject to effective competition."

A. The Commission is Bound by Section 623's Definition of "Effective Competition" Under Basic Principles of Statutory Construction

It is an elementary principle of statutory construction that the definition that Congress has provided for a term in a statute ordinarily controls the meaning of that term throughout the statute. Florida Dep't of Banking and Finance v. Board of Governors of the Federal Reserve System, 800 F.2d 1534, 1536 (11th Cir. 1986), cert. denied 481 U.S. 1013 (1987); see also Singer, Sutherland Statutes & Statutory Construction § 20.08, 1993 Supp. at 16 (4th ed. 1985). This is especially true when the same word is used in the same section of an act more than once. In such a situation, where the "meaning is clear in one place, it will be assumed to have the same meaning in other places." United States v. Ivic, 700 F.2d 51, 60 (2nd Cir. 1983); United States v. Nunez, 573 F.2d 769, 771 (2nd Cir.), cert. denied 436 U.S. 930 (1978); Brown v. National Highway Traffic Safety Administration, 673 F.2d 544, 546 n.5 (D.C. Cir. 1982).

By its express terms, Section 623(l)(1) defines effective competition for all purposes of section 623. Thus, "effective competition" must be construed as having the same meaning whether found in Section 623(a)(2) (barring FCC regulation of certain systems and limiting its jurisdiction over others); Section 623(b)(1) (covering rate regulation for the basic service tier);

Section 623(b)(2)(C) (listing seven statutory factors that the Commission "shall"[9] take into account in prescribing regulations); Section 623(c) (covering regulation of unreasonable rates for cable programming services); or Section 623(c)(2)(B) (enumerating statutory factors to be considered).

Moreover, because there is no ambiguity on the face of the statute, the definition of "effective competition" established by Congress in Section 623(l)(1) should apply in all circumstances, ACLU, 823 F.2d at 1569, and at the very least, in the rate regulation context from which it is derived. Such a result is entirely consistent with congressional intent to craft a precise definition of "effective competition" to substitute for earlier, unsatisfactory FCC definitions and to explicitly guide the Commission's regulation of cable rates.

B. In an Analogous Situation, the Courts Have Cautioned the Commission to Adhere Closely to Statutory Definitions

In ACLU, 823 F.2d 1554, the D.C. Circuit was confronted with a situation bearing many similarities to the one at hand. That case involved a challenge to the FCC's rate regulation rules implementing the 1984 Cable Act. Although the Court of Appeals concluded that the rules adopted by the FCC were, for the most part, reasonable and consistent with the provisions of the 1984

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[9] In interpreting a statute, the Supreme Court has stated that " 'shall' is the language of command." Escoe v. Zerbst, 295 U.S. 490, 493 (1935); see also MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1191 (D.C. Cir. 1985).

Act, it held that in certain key respects, the rules failed to pass muster. The court disagreed with the FCC's determination not to follow the statutory definition of "basic cable service" in the 1984 Act because of the Commission's view that adherence to the statute would lead to anomalous results. Specifically, the court held that the FCC's redefinition of the term "basic cable service" was "contrary to law" where Congress had "spoken directly and specifically" by providing a definition of "basic cable service" in Section 602(2) of the 1984 Act.

Applying traditional tools of statutory construction, the court found that, on the issue of defining "basic cable service," the statute spoke with "crystalline clarity" and that "Congress intended its definition of "basic cable service" to be just that -- a comprehensive definition of the term." The court stated that there was no justification for resorting to the legislative history and that under Chevron, USA v. NRDC, 467 U.S. 837 (1984), "we are instructed . . . that 'that is the end of the matter' and are "directed to 'give effect to the unambiguously expressed intent of Congress.'" ACLU at 1570 (quoting Chevron, 467 U.S. at 842-43).

ACLU confirms the principle that where a statute speaks clearly, deference to an agency's interpretation is inappropriate as a matter of law. See also Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of

Congress.") Section 623 "speaks with crystalline clarity" on the subject of what constitutes "effective competition" for purposes of FCC rate regulation. ACLU, 823 F.2d at 1568. Specifically, Section 623(l)(1) provides a "precise" definition, for purposes of Section 623, of "effective competition," the "exact term the Commission now seeks to redefine." Id. Thus, excluding one of three statutorily-mandated tests for effective competition would conflict with the plain language of Section 623.

This result is not changed simply because the FCC believes a non-statutory test may somehow be a better or more accurate measure of a truly competitive rate. Even if the FCC could arguably create a more accurate approximation of competitive rate levels by excluding the less than 30 percent sample from its rate calculations, "the role of agencies remains basically to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress." Talley v. Mathews, 550 F.2d 911, 919 (4th Cir. 1977). See also Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 374 (1986) (the agency "has no power to correct flaws that it perceives in the statute it is empowered to administer"); Civil Aeronautics Board v. Delta Air Lines, 367 U.S. 316, 322 (1961) ("...the [agency] is entirely a creature of Congress and the determinative question is not what the [agency] thinks it should do but what Congress has said it can do."). Thus, the Commission is not at liberty to adopt a methodology at odds with established statutory standards, and must seek relief from

Congress if it desires to adopt an alternate course.

In any event, given the draconian reduction in rates that may result from the exclusion of the low penetration sample, nothing short of explicit legislative authorization should suffice.[10] See, e.g., SEC v. Sloan, 436 U.S. 103, 122 (1978).